Supreme Court, U.S.
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No. 04-570

In The

Supreme Court of the United States

MARY MARTIN,

Petitioner,

v.

BOYD GAMING CORPORATION d/b/a
M/V TREASURE CHEST CASINO
and TREASURE CHEST CASINO, LLC,

Respondents.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Can a court considering an admiralty and Jones Act case ignore the dictates of 1 U.S.C. § 3 in determining what is a vessel "in navigation" and rely upon an inherently, non-uniform state statute in doing so, thus destroying the harmony and uniformity of the general maritime law?

2. Even if not a vessel "in navigation" for purposes of the Jones Act, can a United States Coast Guard inspected and fully operational, self-propelled, passenger vessel, which is fully manned with a United States Coast Guard licensed Master and marine crew and which remains on the navigable waters of the United States subject to the perils of the sea, be considered a "vessel" for purposes of 1 U.S.C. § 3 making it subject to claims for "vessel" negligence under the general maritime law?

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana granting defendants' motion for summary judgment is reported at 252 F.Supp.2d 321 and is reprinted here as Appendix 5. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 374 F.3d 375 and is reprinted here as Appendix 1. The unreported order by the United States Court of Appeals for the Fifth Circuit denying a petition for rehearing is reprinted here as Appendix 12.

JURISDICTION

The United States District Court for the Eastern District of Louisiana had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1333, as plaintiff claimed seaman's remedies under the Jones Act, 46 U.S.C. § 688, and the general maritime law. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4(a)(2) of the Federal Rules of Appellate Procedure, as well as 28 U.S.C. § 1292(a)(3), as the district court issued final, appealable judgments, dismissing plaintiff's Jones Act and general maritime law claims. The Fifth Circuit Court of Appeals issued the opinion below on July 8, 2004. The Fifth Circuit Court of Appeals denied a request for rehearing on August 6, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3 of the Rules of Construction Act provides in relevant part:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

The Jones Act, 46 U.S.C. § 688(a), provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Section 2 of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 902, provides in relevant part:

> When used in this Act -
>
> * * *
>
> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor-worker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include –
>
> * * *

> (G) a master or member of a crew of any vessel. . . .

33 U.S.C. § 902(3)(G)

Section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, provides in relevant part:

> (b) Negligence of vessel –
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . .

33 U.S.C. § 905(b)

Section 66 of Louisiana Revised Statute, Title 27, Chapter 4 provides in relevant part:

> A. Notwithstanding any provision in this Chapter to the contrary, for purposes of this Section any riverboat licensed to conduct gaming in the parish of the official gaming establishment, except as provided in Subsection B of this Section, shall not be permitted to conduct gaming while docked and shall be required to conduct cruises and excursions as provided in R.S. 27:65(B)(1) as in effect January 1, 1997. . . .

La. R.S. 27:66(A).

Section 65 of Louisiana Revised Statute, Title 27, Chapter 4 provides in relevant part:

> B. Gaming shall be conducted aboard riverboats, subject to the following requirements:

> (1)(a) In the parish of the official gaming establishment, except as provided in R.S. 27:66, no gaming may be conducted while a riverboat is docked. . . .

La. R.S. 27:65(B)(1)(a).

STATEMENT OF FACTS

1. The M/V TREASURE CHEST CASINO – A Traditional, Conventional Vessel

The M/V TREASURE CHEST CASINO is a 213 ft. fully operational, self-propelled, cruising casino ship with a steel hull, raked bow, bilge pumps, ballast tanks, galley, wheelhouse, sea valves, sea chests and strainers, navigational equipment, emergency evacuation plans (EEP), fire dampers, escape hatches, fuel tanks, station bill, stability letter, MARPOL placards, master's logs, radio logs, steering alarms, sprinkler systems, and a dual independent power source for air compressors, pumps and alarms relating to the sprinkler system. It is certified for the carriage of 1725 passengers. It is propelled by twin diesel powered Z-drives, bowthruster, and a diesel-hydraulic powered paddlewheel. It is a traditional, conventional vessel.

The vessel is equipped with 1945 life preservers, two rescue boats, six ring buoys, and until recently, four inflatable rafts. It is equipped with two fire pumps, eight fire axes, 1350 feet of fire hose, two fixed CO_2 fire extinguishing systems, one in the engine room and the other in the emergency generator room, and nearly 40 hand portable and semi-portable fire extinguishers. The vessel

regularly conducts fire and man overboard drills as required by the United Stated Coast Guard.

The vessel is required by the United States Coast Guard to be manned with a full-time navigational crew consisting of 1 master, 1 licensed mate, 4 able seamen, 4 ordinary seamen, 1 chief engineer, 1 oiler, 3 watchmen, and 6 security personnel whose duties include passenger safety, crowd control, lifesaving and firefighting. The Captain performs all of the duties indigenous to a ship's Captain. He periodically fires the engines, conducts man overboard and fire drills, maintains rescue equipment, such as lifeboats, prepares the vessel for Coast Guard inspections, performs required maintenance, and directs "casting off" of the lines and steerage of the vessel when the vessel engages in its periodic, albeit short, voyages. These are the duties that are customarily performed by a ship's Captain. In addition to the navigational crew, the vessel's Certificate of Inspection allows it to carry "179 other persons in the crew," which include gaming personnel like Petitioner Mary Martin.

Simply stated, the vessel would be in violation of the U.S. Coast Guard's Certificate of Inspection without a captain and marine crew and therefore, in non-compliance with Louisiana's riverboat gaming laws. Consequently, the M/V TREASURE CHEST CASINO would not, and could not, be in operation without its captain and crew.

The vessel is secured to a floating dock (entertainment barge) with three sets of mooring lines that can be easily cast off to sail. The only thing different now is that, since the vessel owner elected to pay an increased franchise fee, the vessel is not required to conduct "gaming cruises." However, the vessel can, and still does, make lawful,

periodic voyages – but now it is done without paying customers aboard. As recently as June 4 and 5, 2002, only eight months after Martin's accident, the vessel made two independent voyages so that her berth could be deepened. If a decision was made to sail or to move the vessel to a different locale, the only impediment would be the vessel's mooring lines.

2. Louisiana's Riverboat Gaming Laws – Non-Uniformity on Navigable Waters

Between September of 1994 and April 1, 2001, the M/V TREASURE CHEST CASINO conducted gaming cruises on the navigable waters of Lake Pontchartrain in accordance with Louisiana's riverboat gaming laws. During that time, defendants concede that Martin was considered a Jones Act seamen due to her substantial connection to the M/V TREASURE CHEST CASINO.

During the first extraordinary legislative session for the year 2001, the Louisiana legislature amended Louisiana's gaming control laws to allow some, but not all, casino riverboat operators to remain dockside while conducting gaming activities in exchange for an increased franchise fee being paid to the state of Louisiana. Since that time, or April 1, 2001, defendants allege to have conducted gaming activities exclusively while docked at its berth in Lake Pontchartrain. As such, defendants no longer consider any of its employees, including its Coast Guard licensed Master and marine crew, to be seamen with corresponding benefits of the Jones Act or general maritime law.

La. R.S. 27:66(A) and 27:65(B)(1)(a), while allowing the M/V TREASURE CHEST CASINO to remain dockside

on Lake Pontchartrain during gaming operations, specifically prohibits other riverboat casinos on the same navigable waters from conducting gaming while docked.

La. R.S. 27:66(A) provides in relevant part:

> A. Notwithstanding any provision in this Chapter to the contrary, for purposes of this Section any riverboat licensed to conduct gaming in the parish of the official gaming establishment, except as provided in Subsection B of this Section, **shall not be permitted to conduct gaming while docked and shall be required to conduct cruises and excursions** as provided in R.S. 27:65(B)(1) as in effect January 1, 1997. . . . (Emphasis supplied).

La. R.S. 27:65(B)(1)(a) provides in relevant part:

> B. Gaming shall be conducted aboard riverboats, subject to the following requirements:
>
> (1)(a) In the parish of the official gaming establishment, except as provided in R.S. 27:66, **no gaming may be conducted while a riverboat is docked**. . . . (Emphasis supplied).

(*See* Appendix 14-18). Consequently, crew members on a riverboat in the parish of the official gaming establishment (Orleans Parish), which is less than five nautical miles away from the M/V TREASURE CHEST CASINO and which sits on the same body of water facing the same perils of maritime employment, continue to enjoy coverage under the Jones Act and general maritime law. Thus, uniformity of the maritime law no longer exists upon the

navigable waters of Lake Pontchartrain due to the inherently, non-uniform riverboat gaming laws of Louisiana.

3. Martin's Duties Aboard the Vessel

Martin was hired on February 6, 1995 as a cocktail waitress to serve aboard the M/V TREASURE CHEST CASINO. She served in that capacity for a period of almost seven years, exclusively aboard the M/V TREASURE CHEST CASINO, from her hire date until the date of her injury, October 7, 2001. In addition to her duties as a waitress, Martin also was required to assist the marine crew in evacuating the vessel during fire drill and emergency procedures. She was required to go to a designated station and help passengers don life preservers and assist them to the safest route of egress from the vessel, or if unavailable, to the nearest refuge areas which are the upper and Texas decks.

On the date of her accident, upon embarking onto the loading dock, Martin slipped and fell in an unusually large puddle of grease or cooking oil, striking the ground flat on her back and head, severely injuring her neck, back and arms, rendering her totally disabled. The duty to maintain the loading dock as a safe means of ingress to the vessel where Martin fell was under the direct care, control and supervision of the vessel's Master and marine crew.

REASONS FOR ALLOWANCE OF THE WRIT

In relying upon Louisiana's non-uniform gaming statutes, the United States Court of Appeals for the Fifth Circuit ruled that the M/V TREASURE CHEST CASINO

was not a vessel "in navigation" for purposes of the Jones Act, and therefore not a "vessel" for purposes of the general maritime law. In doing so, the Fifth Circuit failed to analyze separately the issues of "vessel" status under the general maritime law and vessel "in navigation" under the Jones Act. This decision conflicts with 1 U.S.C. § 3, this Court's decision in *Chandris, Inc. v. Latsis*, 515 U.S. 347 (1995), and decisions from the First, Second, and Seventh Circuit Courts of Appeals and earlier decisions of the Fifth Circuit Court of Appeals as to what constitutes a "vessel" for purposes of admiralty jurisdiction. This decision also conflicts with this Court's decision in *Chandris* as to what constitutes a vessel "in navigation" for purposes of the Jones Act and in interpreting Jones Act seaman status.

According to the 1999 National Gambling Impact Study Commission, there are over one hundred riverboat and dockside casinos in the six states of Illinois, Iowa, Indiana, Louisiana, Missouri and Mississippi. The term "riverboat casino" is defined by the NGISC as any "boat that is capable of self-contained operation away from land whether or not it ever leaves the dock." Conversely, "dockside casinos" are those structures that "float on water but are permanently moored." As the term is used, this is a "riverboat casino" case as opposed to a "dockside casino" case. Each of the aforementioned separate states has its own set of laws regulating the movement of these riverboat casinos while patrons are on board, none of which are uniform, thereby lending to the struggle by the lower courts over the issues presented herein. By allowing certiorari in this case, this Court can give clear direction to the lower courts in determining whether these riverboat casinos are "vessels" subject to the court's admiralty

jurisdiction, a decision that will ultimately affect thousands of riverboat gaming industry workers across this country.

This Court recently granted certiorari in the case of *Stewart v. Dutra Construction Co.*, 230 F.3d 461 (1st Cir. 2000), *cert. granted*, No. 03-814 (*Stewart I*), to determine whether a special purpose watercraft (such as a dredge) is a Jones Act "vessel." Since the Fifth Circuit Court of Appeals applied a special purpose vessel analysis to this Jones Act case, Martin submits that this Court's decision in *Stewart I* will directly affect the outcome of the present case as to whether the M/V TREASURE CHEST CASINO is a "vessel" for purposes of the Jones Act. Whether the M/V TREASURE CHEST CASINO is a "vessel" under the general maritime law subject to claims of vessel negligence still needs to be resolved by this Court.

I. The Fifth Circuit erred in declaring that, because a vessel was not "in navigation" for purposes of the Jones Act, it simply was not a "vessel" for purposes of the general maritime law. This Court should resolve the conflict among Congress, this Court's decision in *Chandris*, and decisions by the First, Second, Fifth and Seventh Circuit Courts of Appeals as to what constitutes a "vessel" under 1 U.S.C. § 3 and the general maritime law.

This Court recently reaffirmed its deference to Congressional statutes affecting the general maritime law in *Garris vs. Norfolk Shipbuilding Dry Dock Corp.*, 532 U.S. 811 (2001), where it held, " . . . even in admiralty, 'we have no authority to substitute our views for those expressed by

Congress in a duly enacted statute.'" *Garris, supra, citing Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618 (1978).

Under the general maritime law, a vessel is "every description of watercraft or other artificial contrivance used or capable of being used as a means of transportation on water." This is the "capability" test for vessel status. 1 U.S.C. § 3. "A craft need not be actually engaged in navigation or commerce in order to come within the definition of 'vessel.' The question is one of residual capacity." *McCarthy v. The Bark Peking*, 716 F.2d 130, 134 n.2, 135 (2nd Cir 1983), *cert. denied*, 465 U.S. 1078, 104 S.Ct. 1439, 79 L.Ed.2d 760 (1984).

Even if not a vessel "in navigation" for purposes of the Jones Act, "vessels" do remain subject to claims for vessel negligence under 33 U.S.C. § 905(b) and the general maritime law. *See Howard v. Southern Illinois Riverboat Casino Cruises,* 364 F.3d 854 (7th Cir. 2003), *cert. denied* (U.S. Oct. 18, 2004); *Stewart v. Dutra Construction Co.,* 343 F.3d 10 (1st Cir. 2003) (*Stewart II*). The issue of whether a vessel is also "in navigation" under the Jones Act is a different issue from the question of vessel status under the general maritime law. *Hall v. Hvide Hull No. 3*, 746 F.2d 294 (5th Cir. 1984), *cert. denied*, 474 U.S. 820, 106 S.Ct. 69, 88 L.Ed.2d 56 (1985). *See also Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) wherein the Fifth Circuit considered vessel status **separately** under the Jones Act and Section 905(b) since the term "vessel" in the LHWCA is not synonymous with the term "vessel" pursuant to the Jones Act.

In *Howard, supra*, despite finding that the *Players II*, a riverboat gaming vessel not at all unlike the M/V TREASURE CHEST CASINO, was not a vessel "in navigation" for

purposes of the Jones Act, the Seventh Circuit specifically found that the riverboat was a "vessel." In unmistakable language, the Seventh Circuit stated, "To be precise, it is clear that *Players II* is a vessel. . . . " *Id.* at 856.[1]

In *Stewart II, supra,* a similar result was reached by the First Circuit relative to the plaintiff's vessel negligence claim. There, despite finding that a dredge, or scow, was not a vessel "in navigation" for purposes of the Jones Act, the First Circuit pointed out that, " . . . we need not labor over the 'vessel' status of the SUPER SCOOP or scow for purposes of the LHWCA . . . the LHWCA's definition of 'vessel' is significantly more inclusive than that used for evaluating seaman status under the Jones Act." *Id.* at 13. Most tellingly, the defendant conceded that the vessels at issue were, in fact, "vessels" for purposes of the LHWCA. *Id.*

It is well-settled that a vessel does not cease to be a vessel when she is not voyaging, but is at anchor, berthed, or at dockside, even when the vessel is undergoing repairs. *Chandris, supra, citing DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119, 1121 (1st Cir.) (en banc), *cert. denied*, 506 U.S. 827 (1992). Furthermore, a vessel is considered to be "in navigation," although moored to a dock, if it remains in readiness for another voyage. *Chandris, supra, citing 2 M. Norris, Law of Seamen*, 30.13, p. 364 (4th ed. 1985). Moored casino vessels remain "in navigation" and their non-navigational crew members, such as bartenders and waitresses, qualify as Jones Act seamen as long as those

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[1] The plaintiffs in *Howard* only sought damages under the Jones Act. They did not seek alternative claims for "vessel" negligence as did Martin. Consequently, the issue of vessel negligence was not before the court on appeal.

vessels remain operational. *Wiora v. Harrah's Illinois Corporation*, 68 F.Supp.2d 988 (N.D.Ill. 1999); *Lara v. Harvey's Iowa Management Co.*, 109 F.Supp.2d 1031 (S.D. Iowa 2000); *see also Greer v. Continental Gaming Co.*, 5 S.W.3d 559 (Mo. App. 1999) (a housekeeper on a river boat casino, moored for four months on account of low water, still entitled to Jones Act status).

Moreover, defendants still owe a duty of reasonable care to Martin even on a dead ship according to *West v. U.S.*, 361 U.S. 118 (1959). A negligent breach of that duty is actionable under the general maritime law. *Garris, supra.* The tort immunity provisions of the LWHCA and Louisiana's workers' compensation laws are inapplicable in the instance of a maritime tort/cause of action. *Chandris, supra; Thibodaux v. Atlantic Ritchfield*, 580 F.2d 841 (5th Cir. 1978); *Green v. Vermillion Corp.*, 144 F.3d 332 (5th Cir. 1998).

Prior to April 1, 2001, the defendants admit that Martin was a Jones Act seamen and treated her as such. In fact, the M/V TREASURE CHEST CASINO previously has been held to be a Jones Act vessel and several of its non-navigational crew, including Martin, afforded seaman's status and seaman remedies, albeit before the passage of "dockside gaming." *See Williams v. Treasure Chest Casino, LLC*, 1998 AMC 1300 (E.D.La. 1998). At the time of Martin's injury and continuing to date, the M/V TREASURE CHEST CASINO was and remains a fully operational, passenger vessel, clearly satisfying 1 U.S.C. § 3, this Court's interpretation in *Chandris, supra,* and the courts' holdings in *Stewart II, Howard, and McCarthy, supra.*

Martin submits that the Fifth Circuit clearly erred (1) by ruling that the M/V TREASURE CHEST CASINO was not a vessel "in navigation" for purposes of the Jones Act, and therefore not a "vessel" for purposes of the general maritime law, and (2) by ignoring the dictates of 1 U.S.C. § 3 and relying upon a non-uniform state statute, rather than simply looking at the vessel's residual capacity, in determining vessel status under the general maritime law. The Fifth Circuit's decision should be reversed.

II. The Fifth Circuit erred by applying a "putative" vessel analysis to this conventional vessel case. This Court should resolve the legal standard as to when, if at all, an admiralty court should apply a "putative" vessel analysis to a conventional vessel case.

Martin submits that since the M/V TREASURE CHEST CASINO is a conventional vessel, a conventional vessel analysis, as opposed to a putative vessel analysis, should have been undertaken to determine its vessel status. Under these circumstances, the Fifth Circuit erred as a matter of law in relying upon the putative vessel cases of *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) (platform case), *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) (platform case), and *Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344 (5th Cir. 1998) (special purpose structure case) in determining the vessel status of the M/V TREASURE CHEST CASINO and therefore, its decision should be reversed. If this Court decides that the Fifth Circuit was not in error in applying the *Pavone* line of cases, this Court's decision in *Stewart I* should control

the future course of the present case as it relates to Martin's Jones Act claim.

In *Pavone, supra,* the Fifth Circuit was called upon to decide the narrow issue of whether a barge that was originally constructed to be a floating restaurant and bar and later converted into a casino was a **"putative vessel"** for Jones Act purposes. The analysis undertaken by the Court focused on the time of the alleged injury, assuming that "the subject craft was built and used for nonvessel purposes, was moored other than temporarily to the bank, and either had been 'withdrawn from navigation' or was being used as a 'work platform,' or both." *Pavone* at 568. In adopting this approach, the Court expressed concern over whether too broad of an approach would come back to haunt future Courts in the context of whether these very same floating platforms or work flats would be Jones Act vessels for purposes of accidents occurring while they were being towed to a new location or to a shipyard or drydock for work or repairs or to sheltered waters in avoidance of hurricanes. *Pavone* at 568, footnote 23.

In relying upon its earlier decisions in *Gremillion v. Gulf Coast Catering, Inc.,* 904 F.2d 290, 293 (5th Cir. 1990) and *Bernard v. Binnings Construction Co.,* 741 F.2d 824 (5th Cir. 1984), the Fifth Circuit stated that "[a]s a general principle, where the vessel status of an **unconventional craft** is unsettled, it is necessary to focus upon the 'purpose for which the craft is constructed and the business in which it is engaged.'" *Pavone* at 569-70. "The caselaw is heavily skewed in favor of conferring such status upon craft whose primary mission is the transportation of cargo, equipment, or passengers over navigable waters. The greater the structure's resemblance to conventional

seafaring craft, the greater the odds of securing vessel status. *Gremillion, supra,* at 293.

A survey of the caselaw by the *Gremillion* Court demonstrated three common attributes for **unconventional crafts, or nonvessels,** the first one being most important for the present facts:

(1) The **structure** is **constructed to be used primarily as a work platform;**

(2) The **structure** is moored or otherwise secured at the time of the accident;

(3) Although the **platform** is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the **platform's** primary purpose.

In denying Jones Act vessel status to the Q/B MINDY, the *Gremillion* Court highlighted that the craft did not transport cargo or passengers, it was not designed for navigation, it was not engaged in navigation at the time of the injury, and the motive power was provided externally through towboats, as it had no engines, rudders, or navigational equipment (except lights). It was not registered with the Coast Guard as a vessel. Although transportable, the significance of its transportation function was found to be purely incidental to its primary function of providing living quarters to workers in relatively shallow waterways. The Court therefore found that the shoreside quarterbarge did not qualify as a Jones Act vessel, "as the craft fairly falls within the family of nonvessels styled 'floating work platforms.'" *Gremillion* at 294.

The *Pavone* Court determined that the subject barge had never been used as a seagoing vessel to transport passengers, cargo, or equipment across navigable waters. Neither was it constructed to do so. The barge was constructed to be the floating site of a restaurant and bar. From its inception until it was converted into a floating casino, the barge was moved only once during normal operations to avoid the threat of a hurricane, which one time movement was considered purely incidental to the barge's primary purpose of physically supporting a dockside casino structure. Nor did the barge employ a navigational or nautical crew. Thus, it was found that this indefinitely moored, shoreside, floating casino was a nonvessel for Jones Act purposes. *Id.* at 570.

The present facts are vastly different from those in *Pavone* and *Gremillion, supra,* and Martin respectfully submits that, as such, a putative vessel analysis by the Fifth Circuit in the present case was in error. To make the analysis iron-clad, Martin will point out the obvious distinctions between the M/V TREASURE CHEST CASINO and the work platforms in *Pavone* and *Gremillion.*

First and foremost, the M/V TREASURE CHEST CASINO was **not** originally built to be a "work platform" with its "primary purpose" to function "as an indefinitely moored floating casino," as defendants suggest. Incidentally, the vessel enjoys a "continuously moored" status, as opposed to a "permanently moored" status, with the Coast Guard. Rather, the M/V TREASURE CHEST CASINO was originally built, and is still being used, as a Coast Guard licensed, inspected, passenger carrying riverboat, albeit presently tied to the dock during gaming operations. The defendants have done nothing affirmatively to withdraw the M/V TREASURE CHEST CASINO from navigation.

See St. Paul Fire and Marine Ins. Co. v. Gulfside Casino Partnership d/b/a COPA CASINO, 2002 AMC 143 (S.D. Miss., Nov. 20, 2001) (a casino vessel once considered "in navigation," was subsequently reconstructed as a permanently moored vessel – its power plant and navigational gear has been disabled for at least 10 years; it is not self-propelled, and therefore, cannot be moved except by tug boats). *See also United States v. Ex-USS Cabot/Dedalo*, 297 3d 378 (5th Cir. 2002) ("permanently moored" vessel was decommissioned, moth-balled, had its screws removed, had her engines winterized, and the ship was stripped of most of her operational equipment).

Additionally, the M/V TREASURE CHEST CASINO has all of her vessel features which were found to be missing in *Pavone*, namely diesel engines, self-propulsion, master, navigational aids, crew quarters, a fully operational pilot house, steering mechanism, life-saving equipment, and navigational or nautical crew – all of which remain fully functional on the M/V TREASURE CHEST CASINO. In fact, unlike the work platforms in *Pavone* and *Gremillion*, the M/V TREASURE CHEST CASINO, with its passengers, cargo and equipment, has sailed under its own power hundreds, if not thousands, of times upon the navigable waters of the United States since it was first placed into service in 1994.

III. Martin satisfies *Chandris* for Jones Act seaman status

It has been well-settled that a seaman need not contribute to the navigational function of the vessel to qualify as a Jones Act seaman. *McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 355 (1991). The only two requirements for seaman

status are that (1) an employee's duties must contribute to the function of the vessel or to the accomplishment of its mission; and (2) that employee must have a connection to a vessel in navigation (or to an identifiable group of such vessels) that is substantial in terms of both its duration and its nature. *Harbor Tug and Barge Company v. Papai*, 520 U.S. 548 (1997); *Chandris, supra*.

To satisfy the first prong of the *Chandris* test, the seaman must only show that he/she "does the ship's work." *Chandris*, 515 U.S. at 368, citing *Wilander*, 498 U.S. at 355; *Becker v. Tidewater, Inc., et al.*, 335 F.3d 376 (5th Cir. 2003); *See also In re Endeavor Marine, Inc.*, 234 F.3d 287, 290 (5th Cir. 2000). Since 1995, Martin's entire employment has been spent working aboard the M/V TREASURE CHEST CASINO. In fact, Martin was recently presented with her eight-year pin in recognition of her service aboard the M/V TREASURE CHEST CASINO. It is undisputed that Martin's duties contributed to the function and the mission of the M/V TREASURE CHEST CASINO. Thus, she clearly satisfies the first prong of *Chandris*.

With regard to the second prong of the *Chandris* test, "If it can be shown that the employee performed a significant part of his work on board the vessel on which he was injured, with at least some degree of regularity and continuity, the test for seaman status will be satisfied." *Chandris*, 515 U.S. at 355 (citations omitted). As the Court explained, "[t]he duration of a worker's connection to a vessel and the nature of the worker's activities taken together, determine whether a maritime employee is a seaman because the ultimate inquiry is whether the worker in question is a member of the vessel's crew or simply a land-based employee who happens to be working on the vessel at a given time." *Chandris*, 515 U.S. at 370

(citations omitted). *See also In re Endeavor Marine, supra,* where the Fifth Circuit made clear that a seaman need not literally "go to sea" to qualify as a Jones Act seaman. It is sufficient that he is "subject to the perils of the sea." Put differently, the determination of whether Martin was a seaman under this second prong turns on whether there is sufficient evidence to conclude that Martin was substantially connected to the M/V TREASURE CHEST CASINO. *Becker, supra,* at 13-14. "While seaman status is not simply a temporal concept, the amount of time a worker spends aboard a vessel in navigation is helpful in determining if that worker has attained seaman status. . . . After *Chandris*, this circuit reaffirmed the 30-percent rule. In *Nunez v. B&B Dredging, Inc.*, 288 F.3d 271, 277 (5th Cir. 2002), it was held that because the plaintiff spent only approximately 10% of his work time aboard a vessel in navigation, he did not qualify for seaman status as a matter of law." *Becker, supra,* at 14-15, fn. 7. It is undisputed that Martin spent 100% of her work time aboard the M/V TREASURE CHEST CASINO.

Regarding the perilous nature of maritime employment, fire remains the most feared peril aboard the M/V TREASURE CHEST CASINO, irrespective of whether it is dockside, given the limited egress from the vessel, the volatility and combustibility of the 15,000 to 20,000 gallons of stored diesel fuel, and the close quarters of the vessel itself. Unlike a land-based casino which simply does not store diesel fuel and which may have many ways to escape during a fire, the M/V TREASURE CHEST CASINO has very few ways off the vessel. One need only be reminded of the loss of life which occurred on the Waterman lash vessel STONEWALL JACKSON in 1991 when a flash fire erupted in the engine room, engulfing the engine

room in flames in a matter of seconds, depriving it of oxygen, and killing all six members of the engineering department, to realize that, even while docked, the seamen aboard these vessels face very real and extreme maritime perils. *See In re Waterman S.S. Corp.*, 794 F.Supp. 601 (E.D.La. 1992).

CONCLUSION

This Court should grant the petition for a writ of certiorari in this conventional vessel case and restore the harmony and uniformity of the general maritime law to the lower courts.

Respectfully submitted,

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Mary MARTIN, Plaintiff-Appellant, VERSUS BOYD GAMING CORP., doing business as Treasure Chest Casino MV; TREASURE CHEST CASINO, LLC., Defendants-Appellees.

No. 03-30389, Consolidated with 30-30459

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

374 F.3d 375; 2004 U.S. App. LEXIS 14099

July 8, 2004, Filed

JUDGES: Before DAVIS, PRADO and PICKERING, Circuit Judges.

OPINION BY: W. EUGENE DAVIS: Mary Martin appeals the district court's order granting summary judgment to her employer

OPINION: W. EUGENE DAVIS:

Mary Martin appeals the district court's order granting summary judgment to her employer, Boyd Gaming Corporation, dismissing Martin's *Jones Act* suit on the ground that she was not a seaman because the floating casino upon which she worked was not a vessel. We affirm.

I.

Mary Martin worked as a cocktail waitress on the TREASURE CHEST CASINO (TREASURE CHEST) from February 6, 1995 until October 7, 2001 when she slipped and fell in grease or cooking oil on the loading dock of the TREASURE CHEST. The TREASURE CHEST is a riverboat casino which was built in 1994 as a replica of a 19th Century paddle-wheel steamer. The

TREASURE CHEST is approximately 213 feet in length, paddle-wheel driven, and carries a valid certificate of inspection from the United States Coast Guard. Before the 2001 Louisiana legislative session, the TREASURE CHEST conducted gaming cruises from September 1994 until March 31, 2001 on Lake Pontchartrain. During the 2001 legislative session, the Louisiana legislature abolished the cruise requirement for all riverboat casinos to take effect on April 1, 2001. Beginning April 1, 2001, approximately six months before plaintiff's injury, the TREASURE CHEST conducted gaming activities only while moored. After April 1, 2001 the TREASURE CHEST only moved from her mooring on Lake Pontchartrain on two occasions, in June 2002, to allow for maintenance dredging of her berth.

Relying primarily on *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995), the defendant moved for summary judgment on grounds that the TREASURE CHEST was not a "vessel in navigation" at the time of plaintiff's injury and plaintiff therefore lacked the employment related connection to a vessel to qualify as a *Jones Act* seaman. The district court agreed and dismissed plaintiff's suit.

II.

This case is controlled by *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995). In that case we considered whether the BILOXI BELLE – a 217 foot long floating gambling casino located on the Mississippi gulf coast and moored to shore by lines tied to sunken steel pylons – was a vessel in navigation. The owner of the BILOXI BELLE maintained a towing contract with a

towing company to supply the equipment, facilities and expertise to tow the BILOXI BELLE to sheltered waters in the event threatening weather was forecast. The BILOXI BELLE was in fact towed to sheltered waters on at least one occasion when a hurricane threatened. The BILOXI BELLE never conducted gaming operations except in its stationery moored position.

Martin argues that *Pavone* does not control this case because, unlike the BILOXI BELLE, the TREASURE CHEST was designed and constructed as a vessel and sailed on Lake Pontchartrain for six years before the April 2001 legislation was enacted. We disagree. The rule has never been "once a vessel, always a vessel." Like the barge in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989), once the TREASURE CHEST was withdrawn from navigation so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was not a vessel. *See also, Manuel v. P.A.W. Drilling & Well Service, Inc.*, 135 F.3d 344, 347 (5th Cir. 1998). Applying these principles to the summary judgment evidence in this case, it is clear the TREASURE CHEST had no transportation function in the performance of its function as a gambling casino. After April 1, 2001, the TREASURE CHEST was securely moored during all gaming activity conducted by her customers.

The district court correctly concluded that *Pavone* controls this case and correctly granted summary judgment.[1]

AFFIRMED.

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[1] As part of its memorandum in opposition to defendant's summary judgment motion, plaintiff moved to amend her complaint to assert a claim against the employer under the general maritime law. The district court correctly denied that motion as futile. We agree with the district court that because the TREASURE CHEST is not a vessel in navigation under the *Jones Act* it is likewise not a vessel under the general maritime law foreclosing either a general maritime law claim or a § 905(b) claim. *See Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393, 396 (5th Cir. 1989). *See also, Boomtown Belle Casino v. Bazor*, 313 F.3d 300, 304 (5th Cir. 2002).

**MARY MARTIN VERSUS
BOYD GAMING CORPORATION, ET AL**

CIVIL ACTION NO. 02-3010 SECTION "F"

UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

252 F. Supp. 2d 321; 2003 U.S. Dist. LEXIS 5116

**March 25, 2003, Decided
March 26, 2003, Filed, Entered**

COUNSEL: For MARY MARTIN, plaintiff: Eric Michael Daigle, Eric M. Daigle Attorney at Law, New Orleans, LA.

For BOYD GAMING CORPORATION, TREASURE CHEST CASINO, LLC, defendants: James Melvin Jacobs, John Herr Musser, V, Murphy, Rogers & Sloss, New Orleans, LA.

For TREASURE CHEST CASINO, LLC, defendant: Peter Brooks Sloss, Murphy, Rogers & Sloss, New Orleans, LA.

JUDGES: MARTIN L. C. FELDMAN, UNITED STATES DISTRICT JUDGE.

OPINION BY: MARTIN L. C. FELDMAN

OPINION:

ORDER AND REASONS

Before the Court is defendants' Motion for Summary Judgment. For the reasons that follow, the motion is GRANTED.

Background

Mary Martin seeks damages under the Jones Act, 46 U.S.C. § 688, for unseaworthiness of the M/V TREASURE CHEST CASINO (TREASURE CHEST) and for the defendants' negligence, for injuries she sustained on October 7, 2001, when she slipped and fell in grease or cooking oil which had leaked from garbage bags on the loading dock of the TREASURE CHEST. As a result of the accident, the plaintiff asserts that she has sustained permanent injuries to her neck, back, and arms. She seeks damages for past, present, and future lost wages, medical expenses, lost fringe benefits, pain and suffering, mental anguish, loss of ability to enjoy life, and disability.

Martin worked as a cocktail waitress on the TREASURE CHEST from February 6, 1995, until October 7, 2001, when she had her accident. The TREASURE CHEST is a riverboat casino which was built in 1994 to replicate a 19th century Louisiana steamboat. The TREASURE CHEST is 213.5 feet in length, paddlewheel driven, and carries a valid Certificate of Inspection from the United States Coast Guard. Pursuant to the cruise requirement for all riverboat casinos in Louisiana, which was in effect prior to the 2001 Louisiana legislative session, the TREASURE CHEST conducted gaming cruises from September 1994 until March 31, 2001. During the 2001 legislative session, the Louisiana legislature abolished the cruise requirement for all riverboat casinos, to take effect on April 1, 2001, in exchange for increased franchise fees from the casino operators. As of April 1, 2001, before plaintiff's injury, the TREASURE CHEST has conducted continuous gaming activities only while moored. Since April 1, 2001, the TREASURE CHEST has

only moved from her mooring on Lake Pontchartrain for maintenance purposes on two evenings in June of 2002.[1]

I. Standard for Summary Judgment

Federal Rule of Civil Procedure 56 instructs that summary judgment is proper if the record discloses no genuine issue as to any material fact such that the moving party is entitled to judgment as a matter of law. No genuine issue of fact exists if the record taken as a whole could not lead a rational trier of fact to find for the non-moving party. *See Matsushita Elec. Indus. Co. v. Zenith Radio.*, 475 U.S. 574, 586, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). A genuine issue of fact exists only "if the evidence is such that a reasonable jury could return a verdict for the non-moving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

The Court emphasizes that the mere argued existence of a factual dispute does not defeat an otherwise properly supported motion. *See id.* Therefore, "if the evidence is merely colorable, or is not significantly probative," summary judgment is appropriate. *Id.* at 249-50 (citations omitted). Summary judgment is also proper if the party opposing the motion fails to establish an essential element of his case. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). In this regard, the non-moving party must do more than simply deny the allegations raised by the moving party. *See Donaghey v. Ocean Drilling & Exploration Co.*, 974 F.2d 646, 649 (5th

[1] On June 4 and 5, 2002, the TREASURE CHEST closed for several hours each night and was moved approximately 200 feet from its moored location to allow for maintenance dredging at the berth. There were no patron, games dealers or cocktail waitresses aboard during these dredging operations.

Cir. 1992). Rather, he must come forward with competent evidence, such as affidavits or depositions, to buttress his claims. *Id.* Hearsay evidence and unsworn documents do not qualify as competent opposing evidence. *Martin v. John W. Stone Oil Distrib., Inc.,* 819 F.2d 547, 549 (5th Cir. 1987). Finally, in evaluating the summary judgment motion, the Court must read the facts in the light most favorable to the non-moving party. *Anderson,* 477 U.S. at 255.

II. Application

The Jones Act confers a negligence cause of action on "any seaman who shall suffer personal injury in the course of his employment. . . ." 46 U.S.C. § 688(a). "Seaman" is left undefined in the statute. The United States Supreme Court has established two essential requirements for seaman status: (1) the employee's duties must contribute to the function of the vessel or the accomplishment of its mission and (2) the employee must establish that she has an "employment-related connection to a vessel in navigation" that is "substantial in terms of its nature and duration." *Chandris, Inc. v. Latsis,* 515 U.S. 347, 368, 115 S. Ct. 2172, 2190, 132 L. Ed. 2d 314 (1995). The Supreme Court articulated the purpose underlying the second prerequisite in *Chandris*:

> The fundamental purpose of the substantial connection requirement is to give full effect to the remedial scheme created by Congress and to separate the sea-based maritime employees who are entitled to *Jones Act* protection from those land-based workers who have only a transitory or sporadic connection to a vessel in navigation, and therefore whose employment does not regularly expose them to the perils of the sea.
>
> *Id.*

Importantly, the Supreme Court in *Chandris* focused on "the essence of what it means to be a seaman," noting that "the *Jones Act* remedy is reserved for sea-based maritime employees whose work regularly exposes them to 'the special hazards and disadvantages to which they who go down to sea in ships are subjected.'" *Id. at* 370 (citation omitted).

At the heart of this seaman status dispute is the issue of whether the TREASURE CHEST is a vessel "in navigation." The plaintiff asserts that she [sic] entitled to seaman status because the TREASURE CHEST remains a vessel in navigation, although it is continuously moored, because it has the ability to conduct gaming cruises. The defendants contend that the TREASURE CHEST no longer is a vessel in navigation because it ceased conducting gaming cruises in April 2001, following the legislature's statutory authorization of dockside gaming. Because the TREASURE CHEST no longer conducts, or intends to conduct gaming cruises, the defendants assert that the plaintiff lacks the employment-related connection to a vessel in navigation mandated in *Chandris* to qualify as a *Jones Act* seaman. The Court agrees.

In *Pavone v. Mississippi Riverboat Amusement Corp.*, the Fifth Circuit considered whether the BILOXI BELLE, an indefinitely moored floating dockside casino, constituted a vessel under the *Jones Act* or general maritime law. 52 F.3d 560 (5th Cir. 1995). Relying on the "semi-permanently or indefinitely moored" status of the barge supporting the BILOXI BELLE, the Fifth Circuit held that, at the times of the plaintiffs' alleged accidents, the BILOXI BELLE was removed from navigation and constituted a mere "work platform." *Id. at* 570. Indeed, the

Court reiterated the three common attributes of nonvessels: (1) the structure was constructed to be used as a work platform; (2) the structure is moored or otherwise secured at the time of the accident; and (3) although the platform is capable of movement, and is sometimes moved across navigable waters in the course of normal operations, any transportation function is merely incidental to the platform's primary purpose." *Id. at* 570 (citing *Gremillion v. Gulf Coast Catering Co.,* 904 F.2d 290, 293-94 (5th Cir. 1990). Ultimately, the Fifth Circuit's analysis of putative vessels included, not only vessels used as work platforms, but also vessels that had been "withdrawn from navigation." *Id.* at 568. Importantly, it noted that the BILOXI BELLE was susceptible of being moved and was moved once after being converted into a casino but that such "one-time movement was purely incidental to the barge's primary purpose of physically supporting a dockside casino structure." *Id.*

Additionally, in *Ducrepont v. Baton Rouge Enterprises, Inc.,* 877 F.2d 393, 395 (5th Cir. 1989), the appeals court wrote that the barge at issue was originally built to navigate and was used in navigation, but had ceased to navigate and therefore no longer constituted a vessel "in navigation" for *Jones Act* purposes. This Court inescapably notes that the TREASURE CHEST was also built to navigate, but ceased its transportation function on April 1, 2001, well before plaintiff's accident, and has moved only for maintenance purposes on two occasions. Such limited movement, was clearly incidental to TREASURE CHEST's primary function as a floating, but stationary, gambling casino. This "extremely limited transportation function is 'subordinate to its contrasting function' of providing dockside gaming." *Gremillion v. Gulf Coast Catering, Inc.,*

904 F.2d 290, 294, n. 9 (5th Cir. 1990). Moreover, the defendants' two-year history of compliance and intent to comply with Louisiana law, its Coast Guard Certificate of Inspection reflecting a "continuously moored" status, and intent to remain moored while engaging in its primary function of casino gambling is also telling. *See id. at* 293 ("[T]he intention of the owner to move the structure on a regular basis . . . and the length of time that the structure has remained stationary are also relevant to the inquiry").[2]

Accordingly, defendants' motion for summary judgment on seaman status is GRANTED.

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[2] The plaintiff cites *Dalleo v. Treasure Chest Casino, LLC,* C.A. No. 02-0229 (E.D. La. Nov. 21, 2002) as presenting the identical issue presented to this Court for summary judgment. Indeed, the same defendants moved for summary judgment on seaman status in that case, where the plaintiff was a games dealer on the TREASURE CHEST and was injured approximately a month prior to Martin. Although the defendants' motion was denied, Judge Fallon never assigned reasons for his decision. The case was ultimately settled and therefore the issue was never resolved on the merits. Moreover, the issues raised in some of the briefing in *Dalleo* have not been raised in this case and are not before the Court. In addition, the Court finds that the other cases cited by plaintiff are distinguishable from the facts of this case. Specifically, the cases cited by the plaintiff do not involve a casino vessel that has ceased to navigate. Instead, all of the vessels in the cases cited routinely left their docks to conduct various voyages.

MARY MARTIN, Plaintiff-Appellant v. BOYD GAMING CORP, doing business as Treasure Chest Casino MV; TREASURE CHEST CASINO LLC, Defendants-Appellees

No. 03-30389 Consolidated with 03-30459

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

2004 U.S. App. LEXIS 17140

August 6, 2004, Filed

COUNSEL: For MARY MARTIN, Plaintiff-Appellant (03-30389): Eric Michael Daigle, Law Office of Eric M Daigle, New Orleans, LA.

For BOYD GAMING CORP dba Treasure Chest Casino MV, TREASURE CHEST CASINO LLC, Defendants-Appellees (03-30389): Peter Brooks Sloss, James M Jacobs, Murphy, Rogers & Sloss, New Orleans, LA.

JUDGES: Before DAVIS, PRADO and PICKERING, Circuit Judges.

OPINION BY: W. Eugene Davis

OPINION:

ON PETITION FOR REHEARING

PER CURIAM:

IT IS ORDERED that the petition for rehearing is denied.

ENTERED FOR THE COURT:

W. Eugene Davis

United States Circuit Judge

LOUISIANA REVISED STATUTES
TITLE 27. LOUISIANA GAMING CONTROL LAW
CHAPTER 4. THE LOUISIANA RIVERBOAT ECONOMIC DEVELOPMENT AND GAMING CONTROL ACT PART V.
CONDUCTING OF GAMING OPERATIONS

La. R.S. 27:65 (2004)

§ 65. Licenses to conduct gaming activities upon riverboats; limitations

A. Notwithstanding any other provisions of law to the contrary, upon application properly submitted and examined, the division may issue up to fifteen licenses to conduct gaming activities on a riverboat, in accordance with the provisions of this Chapter. No more than six licenses may be granted for the operation of gaming activities on riverboats for operation from any one designated waterway.

B. Gaming shall be conducted aboard riverboats, subject to the following requirements:

(1)(a) In the parish of the official gaming establishment, except as provided in R.S. 27:66, no gaming may be conducted while a riverboat is docked, unless the vessel is docked for less than forty-five minutes between excursions. However, should the master of the riverboat reasonably determine and certify in writing that the weather conditions or the water conditions are such that those conditions, which the master shall specify, present a danger to the riverboat, its passengers, and crew, then the riverboat may remain docked and gaming may take place until such time as the master determines that those conditions have sufficiently diminished to proceed or until the duration of the authorized excursion has expired. A

riverboat gaming licensee authorized to conduct gaming pursuant to this Subparagraph shall pay the franchise fee provided in R.S. 27:91(C)(1) and shall pay either the additional franchise fee provided in R.S. 27:91(C)(2) or, if applicable and authorized by R.S. 27:66, the additional franchise fee in the amount provided in R.S. 27:91(C)(4).

(b) For the purposes of this Chapter, on or after September 15, 1993, in any parish which borders the Red River beginning five miles south of the Kansas City Southern Company/Louisiana Arkansas Crossing Railroad Bridge in Rapides Parish and ending five miles north of the Mid-South Company Railroad Bridge in Caddo Parish, gaming shall only be conducted while a riverboat is docked and no cruises or excursions shall be conducted. A riverboat gaming licensee authorized to conduct gaming while a riverboat is docked pursuant to this Subparagraph shall pay the franchise fee in the amount provided in R.S. 27:91(C)(1) and the additional franchise fee in the amount provided in R.S. 27:91(C)(3).

(c) For all licensees other than those licensed pursuant to R.S. 27:65(B)(1)(a) or (b), gaming may only be conducted on a riverboat while it is docked and the licensee shall not conduct cruises or excursions. A riverboat gaming licensee authorized to conduct gaming on a riverboat while it is docked pursuant to this Subparagraph shall pay the franchise fee in the amount provided in R.S. 27:91(C)(1) and the additional franchise fee in the amount provided in R.S. 27:91(C)(2).

(2) Riverboat cruises shall be not less than three nor more than eight hours in duration for a round trip, should the licensee offer or be required to offer, excursions while conducting gaming activities, with the exception of any

extended excursions, each of which shall be expressly approved by the commission.

(3) Agents of the division may be on board at any time during gaming operations for the purpose of determining compliance with the provisions of this Chapter.

(4) Gaming devices, equipment, and supplies customarily used in conducting gaming, must be purchased or leased only from suppliers permitted for such purpose under this Chapter.

(5) Licensees shall permit no form of wagering on games except as permitted by this Chapter, and the rules of the division.

(6) Gaming may only take place in the designated gaming area while the riverboat is upon a designated river or waterway.

(7) Gaming equipment may not be possessed, maintained, or exhibited by a person on a riverboat except in the designated gaming area, or a secure area used for inspection, repair, or storage of the equipment and specifically designated for that purpose.

(8) Wagers may be received only from a person present on a licensed riverboat.

(9) A person under age twenty-one shall not be permitted in the designated gaming area of a riverboat.

(10) Gaming is permitted only on the rivers described in R.S. 27:43.

(11) Except for racehorse wagering and the play of slot machines, gaming wagers may be made only with tokens, chips, vouchers, coupons, or electronic cards issued

by the licensee. Such tokens, chips, vouchers, coupons, or electronic cards may be used while aboard the riverboat only for the purpose of making wagers on gaming games. Electronic cards may be used which are affixed with a magnetic storage media, a "smart card" or those containing an integrated circuit chip, but excluding credit cards issued by any other entity or institution.

(12) Licensees must use only those docking facilities and routes for which they are licensed and may only board and discharge passengers at the riverboat's licensed berth.

(13) Licensees must have adequate protection and indemnity insurance, as determined by the commission, at all times during operation of a riverboat.

(14) Licensees and riverboats must have all necessary federal and state licenses, certificates, or other regulatory approvals prior to operating a riverboat.

(15) In addition to the above, gaming must be conducted in accordance with all the terms of the license, the requirements set forth in this Chapter, and rules and regulations adopted by the division and the commission.

La. R.S. 27:66 (2004)

§ 66. Gaming while a riverboat is docked in the parish of the official gaming establishment

A. Notwithstanding any provision in this Chapter to the contrary, for purposes of this Section any riverboat licensed to conduct gaming in the parish of the official gaming establishment, except as provided in Subsection B of this Section, shall not be permitted to conduct gaming

while docked and shall be required to conduct cruises and excursions as provided in R.S. 27:65(B)(1) as in effect January 1, 1997, and shall, in addition, meet the requirements of R.S. 27:44(4) and R.S. 27:44(23)(c) and (d) as in effect January 1, 1997.

B. Notwithstanding any provision in this Chapter to the contrary, the provisions of R.S. 27:65(B)(1)(c) and 66 shall apply to not more than one licensed riverboat at any time which must be located on Lake Pontchartrain in the parish of the official gaming establishment as defined in R.S. 27:203 and 205(26) if and only if:

(1) Such riverboat conducts gaming activities in an area not exceeding thirty thousand square feet in the aggregate;

(2) The owner or operator of such riverboat does not participate directly or indirectly in the ownership, construction, operation, or subsidization of any hotel of a size exceeding three hundred ninety-nine guest rooms within a distance of one mile from the berthing area of the licensed riverboat; and

(3) Such riverboat does not maintain or offer for patron or public use on the vessel or at its terminal, berthing area, or any hotel referred to above, more than eight thousand square feet of restaurant facilities in the aggregate, exclusive of food preparation and handling area.

C. In the event the riverboat referred to in Subsection B of this Section violates any of the restrictions set forth in Paragraphs (1), (2), and (3) of Subsection B of this Section, no gaming may be conducted as long as such violation continues.

D. Notwithstanding the provisions of Subsections B and C of this Section, if the official gaming establishment is not subject to the Amended and Renegotiated Casino Operating Contract among the state of Louisiana by and through the Louisiana Gaming Control Board, Harrah's Jazz Company and Jazz Casino Company, L.L.C., effective as of October 30, 1998, as amended, and is not subject to any other casino operating contract as defined in R.S. 27:205(6) which contains exclusivity provisions in accordance with R.S. 27:201 et seq., any riverboat licensed in the parish of the official gaming establishment may conduct gaming activities in compliance with the provisions of Subsection B of this Section without adhering to the restrictions set forth in Paragraphs (1) through (3) of Subsection B of this Section.

E. A riverboat gaming licensee authorized to conduct gaming while the riverboat is docked in the parish of the official gaming establishment shall be subject to all other applicable provisions of law, rules, and regulations which govern riverboat gaming, not inconsistent with the provisions of this Section.

Supreme Court, U.S.
FILED
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No. 04-570

In The Supreme Court of the United States

MARY MARTIN,

Petitioner,

v.

BOYD GAMING CORPORATION d/b/a M/V TREASURE CHEST CASINO and TREASURE CHEST CASINO, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. A "vessel in navigation" under the Jones Act must have transportation over navigable waters as its primary function. Since Louisiana adopted dockside gaming on 1 April 2001, the M/V TREASURE CHEST has been legally prohibited from moving while conducting its primary function, casino gaming, and has moved only twice, for berth maintenance with its casino closed. How could the M/V TREASURE CHEST be a "vessel in navigation" under the Jones Act?

2. Jones Act seaman status is reserved for employees who regularly face "the special hazards and disadvantages" of those who go to sea, the "perils of the sea." The M/V TREASURE CHEST permanently moored more than six months before this petitioner's accident and petitioner, a cocktail waitress, no longer faced any hazards associated with a navigating vessel. Why should a cocktail waitress on a permanently moored casino boat enjoy the special remedies afforded seamen?

3. Federal maritime law applies to torts that occur on navigable waters (maritime situs) when the accident has a potentially disruptive impact on maritime commerce and a substantial relationship to traditional maritime activity (maritime nexus). This petitioner was injured onshore when she allegedly slipped in cooking grease leaking from garbage bags removed from a shoreside kitchen. How could petitioner claim a maritime situs and a maritime nexus in this case?

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Treasure Chest Casino, L.L.C., a Louisiana limited liability company, d/b/a Treasure Chest Casino is owned by Boyd Louisiana, L.L.C. (85%) and Boyd Kenner, Inc. (15%). Respondent Boyd Gaming Corporation is a publicly traded company trading on the New York Stock Exchange under the symbol "BYD."

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INTRODUCTION

To qualify for seaman status, an employee must have a substantial employment-related connection to a "vessel in navigation." To qualify as a "vessel in navigation" under the Jones Act, a floating structure must have, as its primary mission, "the transportation of cargo, equipment or passengers over navigable waters." And vessel status can change: a vessel that was once in navigation can be withdrawn from navigation and lose its Jones Act vessel status.

On 1 April 2001, the M/V TREASURE CHEST was moored permanently and thus ceased to be "in navigation." Although the TREASURE CHEST retained many attributes of a traditional vessel, the TREASURE CHEST no longer had any significant transportation function. In fact, the vessel was prohibited from conducting its primary function, casino gaming, while moving, under both Louisiana law and its United States Coast Guard Certificate of Inspection. And the TREASURE CHEST has moved only twice since 1 April 2001; on 4 and 5 June 2002 for maintenance dredging of its berth with the casino shut down. The Fifth Circuit's holding that the TREASURE CHEST was not in navigation, and petitioner was not a seaman, when she was allegedly injured on shore on 7 October 2001 was therefore legally correct.

The Jones Act remedy is reserved for sea-based maritime employees who regularly face "the special hazards and disadvantages to which they who go down to sea in ships are subjected." Seaman status applies only to those workers who are regularly exposed to the "perils of the sea." The TREASURE CHEST had stopped navigating more than six months before this petitioner's accident, and

from that point on petitioner, a cocktail waitress, never faced the "perils of the sea." The special privileges reserved for seamen should not extend to a cocktail waitress on a casino vessel that never leaves the dock. This, too, establishes that petitioner was not a seaman at the time of her alleged accident.

In addition, because the TREASURE CHEST was not a vessel for Jones Act purposes, it also was not a vessel under the General Maritime Law. And petitioner's accident does not otherwise support maritime jurisdiction and the application of maritime law. Petitioner's accident occurred onshore, and there was no maritime situs. Moreover, her alleged slip and fall onshore, in kitchen grease leaking from garbage bags removed from a shoreside kitchen, had no potentially disruptive impact on maritime commerce and no substantial relationship to traditional maritime activity, *i.e.*, no maritime nexus. In short, petitioner lacked the bases for a maritime tort claim.

There is no reason for this Court to exercise its jurisdiction in this case. A petition for a writ of certiorari will be granted only for compelling reasons such as: (a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power; or (b) a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an

important federal question in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. Rule 10. The principal purpose for which this Court uses certiorari jurisdiction is to resolve conflicts among circuit courts of appeals and state courts concerning the meaning of provisions of federal law. *Braxton v. U.S.*, 500 U.S. 344, 347, 111 S.Ct. 1854, 1857, 114 L.Ed.2d 385 (1991). None of these "compelling reasons" exist in the present case to warrant the involvement of this Court.

There is complete harmony in the circuit court opinions on the issue presented here. Two courts have addressed the issue: the Fifth Circuit in the present matter and the Seventh Circuit in *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied,* 125 S.Ct. 373 (2004). Both courts reached the identical conclusion: that casino gaming vessels formerly engaged in regular navigation but now moored indefinitely for dockside gaming are no longer "vessels in navigation" for Jones Act seaman status. And the decisions do not present important questions of federal law, but merely applied established legal principles to nearly identical facts, which in the present matter are undisputed. Thus, there is no reason for this Court to grant a writ in this matter.

STATEMENT OF JURISDICTION

The jurisdictional statement of petitioner is incorrect: the lower courts did not have subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1333, because they found that petitioner had no claims under the Jones Act, 46 U.S.C. §688, or under the General Maritime Law. There

is, in fact, no Federal subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1333. And there is no diversity of citizenship (Treasure Chest Casino, LLC and Martin are both Louisiana citizens), so Federal jurisdiction is lacking altogether.

STATEMENT OF THE CASE

A. Statement of Facts

The following facts were and are undisputed:

Petitioner was employed as a cocktail waitress at the Treasure Chest Casino in Kenner, Louisiana, from early 1995 until her alleged slip and fall accident on a shoreside loading dock on 7 October 2001. Petitioner claims that, while walking to the casino to begin her shift, she slipped in kitchen grease that allegedly leaked from garbage bags removed from a shoreside kitchen to the loading dock. There was nothing maritime or vessel-related about the accident.

Respondents, Boyd Gaming Corp. and Treasure Chest Casino, LLC, a Louisiana limited liability company d/b/a Treasure Chest Casino (collectively hereafter "Treasure Chest"), own and operate the TREASURE CHEST, a casino gaming vessel built to comply with the design requirements of the Louisiana riverboat gaming laws. Specifically, the TREASURE CHEST carries a valid Certificate of Inspection from the United States Coast Guard, has a length of 213.5 feet, is paddlewheel driven, and replicates, as nearly as practicable, a Louisiana river borne steamboat passenger vessel of the 19th Century era.

See, LSA-R.S. 27:44(23).[1] From the inception of its business operations in September 1994 until 31 March 2001, the TREASURE CHEST conducted gaming cruises on the navigable waters of Lake Pontchartrain for 90 minutes out of every three hours of operation, weather permitting.

During the first extraordinary legislative session for the year 2001, the Louisiana Legislature abolished the cruise requirement for all riverboat casinos in Louisiana in exchange for increased franchise fees from the casino operators. Appendix to Petition for a Writ of Certiorari ("Pet. App.") at 14-19. Beginning on 1 April 2001, riverboat casinos, such as the TREASURE CHEST, were specifically required to conduct "dockside gaming." The riverboats were no longer required to leave the dock at specified intervals and, instead, could conduct gaming activities *only* while permanently moored. Pet. App. at 15.

Similarly, the United States Coast Guard prohibits the vessel from leaving its berth. On 31 July 2001, the United States Coast Guard issued an Amended Certificate of Inspection that allows for vessel operations only in a "continuously moored" status. The vessel's current Certificate of Inspection, effective through 31 July 2007, also provides that vessel operations are to be conducted only in a "continuously moored" status.

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[1] In *Chase v. Louisiana Riverboat Gaming Partnership*, 709 So.2d 904, 911 (La. App. 2nd Cir. 1998), the court concluded that the definition of a "vessel" under the Louisiana gaming laws has an entirely different context and purpose than the meaning of a vessel for Jones Act purposes, and the determination of vessel status under the Jones Act and the General Maritime Law will not be influenced by the state's licensing scheme.

Since 1 April 2001, the TREASURE CHEST has conducted all of its gaming operations at dockside. With one exception, the TREASURE CHEST has remained permanently moored in her protected berth on Lake Pontchartrain since 1 April 2001. On the evenings of 4 and 5 June 2002, the TREASURE CHEST was closed for several hours each night, and was moved approximately 200 feet from her permanently moored location to allow for maintenance dredging of her berth. Neither patrons, games dealers nor cocktail waitresses (like petitioner) were aboard the vessel when the dredging operations took place and the vessel was moved. From 1 April 2001, the TREASURE CHEST never moved with petitioner onboard. Treasure Chest has no intention to resume gaming cruises and anticipates that the vessel will remain permanently moored at its current location for the indefinite future.

B. Decision of the lower courts

Martin sued Treasure Chest in the United States District Court for the Eastern District of Louisiana on 4 October 2002, alleging that she was a seaman and member of the crew of the TREASURE CHEST and asserting a negligence claim under the Jones Act, 46 U.S.C. §688, and an unseaworthiness claim under the General Maritime Law. On 26 March 2003, the district court granted summary judgment dismissing Martin's claims on the basis that Martin was not a seaman as a matter of law, because the undisputed material facts established that the TREASURE CHEST, although clearly a vessel, was no longer "in navigation," a fundamental requirement of Jones Act seaman status, when Martin was allegedly injured. *Martin v. Boyd Gaming Corp.*, 252 F. Supp. 2d 321 (E.D. La. 2003); Pet. App. at 5-11. The court concluded

that the TREASURE CHEST had been withdrawn from navigation when it began dockside gaming on 1 April 2001, and that the employees' Jones Act status was withdrawn at the same time. *Id.* at 324; Pet. App. at 10-11. And because the casino boat was not a "vessel in navigation," the court refused to let plaintiff amend her complaint to sue Treasure Chest for negligence under the General Maritime Law. Pet. App. at 4, n.1.

Martin appealed the district court's orders granting summary judgment and denying leave to amend to the United States Court of Appeals for the Fifth Circuit, but the Fifth Circuit affirmed. *Martin v. Boyd Gaming Corp.*, 374 F.3d 375 (5th Cir. 2004); Pet. App. at 1. The Fifth Circuit held that once the TREASURE CHEST was withdrawn from navigation so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was not a vessel. 374 F.3d at 377; Pet. App. at 3. It was clear to the court that the TREASURE CHEST had no transportation function in the performance of its mission as a gambling casino because, after 1 April 2001, the TREASURE CHEST was securely moored during all gaming activity conducted by her customers. *Id.* The court concluded that the district court correctly granted summary judgment. *Id.*; Pet. App. at 4.

The Fifth Circuit also held that the district court correctly denied Martin's motion to amend her complaint to assert a claim against her employer under the General Maritime Law. *Id.* at n.1. The court agreed with the district court that because the TREASURE CHEST is not a vessel in navigation under the Jones Act, it is likewise

not a vessel under the General Maritime Law, foreclosing a General Maritime Law claim.[2]

REASONS FOR DENYING THE PETITION

There is complete harmony in the circuit court opinions on the issue presented here. The United States Courts of Appeals for the Fifth and Seventh Circuits agree that continuously moored riverboat casinos that serve no transportation function are not "vessels in navigation." In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir.), *cert. denied,* 125 S.Ct. 373 (2004), the Seventh Circuit held that a riverboat casino engaged in dockside gaming, which is fully capable of navigating but serves no transportation function and is indefinitely moored to a dock, is not a "vessel in navigation" so as to confer seaman status on any employee of the casino within the meaning of the Jones Act. The holding of the Seventh Circuit is in complete accord with the ruling of the Fifth Circuit in this action. Pet. App. at 1-4. The material facts presented by both cases are indistinguishable. No other United States Court of Appeals or district court has handed down a contrary ruling on the facts presented here. Nor has any state court of last resort.

[2] The court also held that the lack of vessel status precluded plaintiff from asserting a vessel negligence claim under the Longshore and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. §§901, 905(b). Moreover, the court had previously concluded that casino vessel workers were exempted from LHWCA application under the recreational vessel exclusion in §902(3)(B) of the Act. *Boomtown Belle Casino v. Bazor*, 313 F.3d 300 (5th Cir. 2002), *cert. denied*, 540 U.S. 814, 124 S.Ct. 65, 157 L.Ed.2d 29 (2003).

Martin now asks this Court to create a "backdoor" in which non-maritime employees such as Martin, working on continuously moored riverboat casinos, can enjoy the benefits of seaman remedies where none exist. For the reasons cited by the district court and the Fifth Circuit in the present case, and by the Seventh Circuit in *Howard*, Martin's petition for a writ of certiorari should be denied.

I. Martin does not satisfy *Chandris* for Jones Act seaman status because her employment duties did not expose her to the special hazards of the sea.

This Court's two most recent cases to address seaman status – *Chandris* and *Papai* – have made clear that the special privileges afforded seamen are reserved for those whose employment exposes them to the sea's "special hazards and disadvantages." *Chandris, Inc. v. Latsis*, 515 U.S. 347, 370, 115 S.Ct. 2172, 2190, 132 L.Ed.2d 314 (1995). A fundamental part of the inquiry into whether a particular individual qualifies as a Jones Act seaman is a determination of whether the employee's duties "take that employee to sea." *Harbor Tug and Barge Co. v. Papai*, 520 U.S. 548, 555, 117 S.Ct. 1535, 1540, 137 L.Ed.2d 800 (1997). In *Chandris*, this Court explained:

> In defining the prerequisites for Jones Act coverage, we think it preferable to focus upon the essence of what it means to be a seaman. . . . The Jones Act remedy is reserved for sea-based maritime employees whose work regularly exposes them to "the special hazards and disadvantages to which they who go down to sea in ships are subjected."

515 U.S. at 369-70, 115 S.Ct. at 2190, citing *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 104, 66 S.Ct. 872 (1946).

Thus, seaman status applies only to those workers who regularly face the "perils of the sea." *In re Endeavor Marine Inc.*, 234 F.3d 287, 291 (5th Cir. 2000), citing *Papai*, 520 U.S. at 554-55, 117 S.Ct. at 1540. At minimum, this requires a vessel that regularly navigates. *Id.* In the wake of *Chandris* and *Papai*, courts have concluded that employees who spend their time working aboard moored or docked vessels are not exposed to the perils of the sea and are not seamen. *See, e.g., Schultz v. Louisiana Dock Company*, 94 F. Supp. 2d 746, 750 (E.D. La. 2000); *Jones v. Daybrook Fisheries, Inc.*, 2001 WL 1502336 (E.D. La. Nov. 20, 2001).

The fact that petitioner was once a seaman does not mean she is always a seaman. This Court has instructed that "[i]f a maritime employee receives a new work assignment in which his essential duties are changed, he is entitled to have the assessment of the substantiality of his vessel-related work made on the basis of his activities in his new position." *Chandris*, 515 U.S. at 372, 115 S.Ct. at 2191-92. The same is true when the vessel's status changes. *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 190-91, 72 S.Ct. 216, 218, 96 L.Ed. 205 (1952). Thus, even if Martin's job duties did not change, the fact that she no longer performed those duties at sea precludes her from claiming seaman status based on her "prior service at sea." *Chandris, supra.*

Martin stopped "going to sea" on 1 April 2001 when the TREASURE CHEST stopped conducting gaming cruises and moored permanently. Although Martin's duties did not change, this change in the vessel's operations

affected a change in Martin's status. Thus, on 1 April 2001, petitioner received a permanent new work assignment that kept her at the dock, and her seaman status must be based on her work following that change in assignments. *Chandris, supra*. When Martin permanently ceased going to sea, she lost entitlement to the unique remedies reserved for seamen.

Petitioner's claim that she was a seaman because she was exposed to uniquely maritime perils, such as fire, is erroneous. Pet. at 20-21. The perils to which petitioner was exposed as a cocktail waitress on board the moored TREASURE CHEST were no different than those to which any other non-seaman dockside worker is exposed; those "perils" were not even uniquely maritime. Fire is no more a threat to employees on the TREASURE CHEST than to workers in any other building having limited ingress and egress, such as nightclubs, hotels, restaurants, and office buildings. There was no danger of the TREASURE CHEST sinking with petitioner onboard, as recognized by the Coast Guard in authorizing the removal of the TREASURE CHEST's lifeboats. The threat posed by waterborne terrorists is no greater with the TREASURE CHEST than it would be for any waterfront structure. Even the threat of collision/allision is not significantly greater than that for any riverfront structure (the M/V BRIGHT FIELD's allision with the Hilton Riverside Hotel and Riverwalk Mall in New Orleans in December 1996 comes to mind).

In sum, after 1 April 2001, Martin did not go to sea and was not subjected to those "special hazards and disadvantages" that seamen encounter. She was a land-based worker aboard a permanently moored riverboat

casino. Therefore, the courts below correctly held that she was not a seaman as a matter of law.

II. The vessel analysis used by the Fifth Circuit to determine vessel status correctly recognized that a connection with a "vessel in navigation" is essential to seaman status.

Petitioner contends that the Fifth Circuit erred by allegedly applying a "putative" vessel analysis to this case. Pet. at 14. Petitioner focuses primarily on the first factor in the so-called "putative" vessel analysis, whether the "structure is constructed to be used primarily as a work platform." Pet. at 16. Petitioner argues that the M/V TREASURE CHEST casino was not originally built to be a "work platform," but was built as a Coast Guard licensed riverboat. Pet. at 17. As such, petitioner contends, the Fifth Circuit used an incorrect analysis in regards to the TREASURE CHEST. Pet. at 17-18.

But petitioner's focus is unduly narrow. As this Court has recognized, vessel status depends not on the original purpose for which a craft was built, but on its purpose and function when the alleged accident occurred. In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 72 S.Ct. 216, 96 L.Ed. 205 (1952), an employee of a company that ran a seasonal boat rental operation was killed while working on the boats, which were stored on land for the winter. This Court held that the decedent was not a seaman within the meaning of the Jones Act, because "[t]here was no vessel engaged in navigation at the time of the decedent's death." *Id.* at 191. "The fact that he had been, or expected in the future to be, a seaman does not render maritime work which was not maritime in its nature." *Id.* (quoting *Antus v. Interocean S.S. Co.*, 108 F.2d 185, 187 (6th Cir. 1939)).

Once the ships were out of navigation, the employee lost his status as a seaman.

The court below has previously applied this rule, without challenge from this Court. Thus, in *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989), the Fifth Circuit held that a barge that was originally navigable, but was permanently moored to provide painting services and was seldom moved, was not a "vessel" within the meaning of the Jones Act or the Longshore and Harbor Workers' Compensation Act:

> The barge at issue in this case was used primarily as a work platform. Additionally, it was moored at the time of the accident; and any transportation function it performed was merely incidental to its primary purpose of serving as a work platform. It was not, however, constructed as a work platform. Nonetheless, the district court correctly concluded that the barge was not a vessel for Jones Act purposes.

Id. at 395. And in the *Pavone* case, the case on which petitioner claims the Fifth Circuit improperly relied (Pet. at 14), the court acknowledged that the purpose for which the barge supporting the casino was constructed was "not a key factor given *Ducrepont*'s recognition that original construction as a work platform is not a prerequisite." *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560, 570 (5th Cir. 1995). This rule is consistent with *Desper* and was correctly applied in the courts below.

Thus, petitioner's attempt to distinguish *Pavone* on the grounds that the TREASURE CHEST was originally designed and constructed as a navigating vessel is unavailing. Pet. at 17-18. As the Fifth Circuit stated, the rule has never been "once a vessel, always a vessel." 374 F.3d at 377;

Pet. App. at 3. Once the TREASURE CHEST was withdrawn from navigation, so that transporting passengers, cargo or equipment on navigable water was no longer an important part of the business in which the craft was engaged, the craft was no longer a vessel "in navigation." *Id.* The purpose for which the TREASURE CHEST was originally built and used, while to some degree relevant, does not overcome the fact that as of 1 April 2001, the TREASURE CHEST ceased to have transportation over water as a significant part of its function as a gaming vessel, and was not "in navigation."

The Seventh Circuit used the same analysis in determining that a riverboat casino very much like the TREASURE CHEST, which was indefinitely moored for dockside gaming, was not a vessel in navigation. In *Howard v. Southern Illinois Riverboat Casino Cruises, Inc.*, 364 F.3d 854 (7th Cir. 2004), the Seventh Circuit held that, "[I]n order for a vessel to satisfy the navigation requirement, the purpose of the vessel must to some reasonable degree be the transportation of passengers, cargo, or equipment from place to place across navigable waters." *Id.* at 857 (internal quotations omitted). The court noted that the purpose of the casino was not to move cargo or people but merely to provide a legal venue under Illinois law for gambling. *Id.* The court held that "an indefinitely moored dockside casino with no transportation function or purpose is not a vessel 'in navigation.'" *Id.* "In applying this test, courts will need to examine, among other factors, the current use of the vessel and the question whether the owner intends to move the structure on a regular basis and the length of time the structure has remained stationary." *Id.* at 858 (internal citations and quotations omitted). This Court denied the petition for writ of certiorari. 125 S.Ct. 373 (2004).

The analysis used by the Fifth and Seventh Circuit Courts of Appeals looks at whether the casino's current, primary use involves transportation. That is and was the legally proper approach. In this case, the undisputed facts established that the TREASURE CHEST had no transportation function when petitioner was allegedly injured. There is no issue for this Court to resolve, and it should deny petitioner's writ application.

III. The Fifth Circuit correctly concluded that, because the Treasure Chest was not "in navigation" for purposes of the Jones Act, it was not a "vessel" for purposes of the General Maritime Law.

Petitioner contends that the Fifth Circuit erred in declaring that, because the vessel was not "in navigation" for purposes of the Jones Act, it likewise was not a "vessel" for purposes of the General Maritime Law. Pet. at 14. However, this Court has made the very same association between the Jones Act and General Maritime Law:

> Since . . . the S. S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness. This limitation is analogous to that applied in libels under the Jones Act, 46 U.S.C.A. §688, where it has long been held that recovery is precluded if the ship involved is not a vessel in navigation.

Roper v. U.S., 368 U.S. 20, 23-24, 82 S.Ct. 5, 7-8, 7 L.Ed.2d 1 (1961) (citations omitted) (finding that a ship withdrawn from navigation in 1945, and in 1954 utilized as a grainery or mobile warehouse, which was filled and moved out of the way by tug, and then returned by tug to a grain

elevator and unloaded, had not been converted into a vessel in navigation).

Petitioner maintains, nonetheless, that, under 1 U.S.C. §3, the definition of "vessel" under the General Maritime Law is broader than under the Jones Act, and that the absence of a transportation function is not fatal to a general maritime tort claim. That is simply untrue. It has long been a general rule that vessels were defined "in a very broad sense, to include all navigable structures *intended for transportation.*" *Cope v. Vallette Dry-Dock Co.*, 119 U.S. 625, 629, 7 S.Ct. 336, 338, 30 L.Ed. 501 (1887) (emphasis added). "The fact that it floats on the water does not make it a ship or vessel." *Id.* at 627.

Even back in 1926, this Court recognized that permanently moored structures like the TREASURE CHEST would not be considered vessels under 1 U.S.C. §3:

> The only question presented is whether appellant's wharfboat was a 'vessel' at the time it sank. It was an aid to river traffic, but it was not used to carry freight from one place to another. It was not practically capable of being used as a means of transportation. It served at Evansville as an office, warehouse, and wharf, and was not taken from place to place. The connections with the water, electric light, and telephone systems of the city evidence a permanent location. It performed no function that might not have been performed as well by an appropriate structure on the land and by a floating stage or platform permanently attached to the land. It did not encounter perils of navigation to which craft used for transportation are exposed.

Evansville & Bowling Green Packet Co. v. Chero Cola Bottling Co., 271 U.S. 19, 22, 46 S.Ct. 379, 380, 70 L.Ed. 805 (1926) (holding that seasonal movement of a moored, floating structure was not sufficient to confer vessel status). In short, if it floats but does not move, it is not a vessel under the General Maritime Law.

Petitioner's contention that a conflict exists among the First, Second, Fifth and Seventh Circuit Courts of Appeals as to what constitutes a "vessel" under 1 U.S.C. §3 and the General Maritime Law is also untrue. Pet. at 10. Those courts all recognize that the transportation or navigation function of a craft determines whether the craft is a "vessel" under either the Jones Act or the General Maritime Law. *See, Powers v. Bethlehem Steel Corp.*, 477 F.2d 643, 646-471 (1st Cir.), *cert. denied*, 414 U.S. 856, 94 S.Ct. 160, 38 L.Ed.2d 106 (1973) ("Recovery under the Jones Act or under the general maritime law for unseaworthiness requires affiliation with a 'vessel' . . . We believe the raft upon which [plaintiff] was injured was not a vessel. . . . The purpose and business of the present craft was not the transportation of passengers, cargo, or equipment from place to place across navigable waters."; holding that floating construction platform secured to land is not a "vessel" for purposes of either the Jones Act or General Maritime Law); *Tramutola v. City of New York*, 104 F.3d 356, 1996 WL 687983 (2nd Cir. 1996) (unpublished opinion) ("[Plaintiffs] failed to establish that [injured plaintiff] was employed in connection with a 'vessel in navigation,' as required for recovery under the Jones Act and general maritime law."); *Weaver v. Hollywood Casino-Aurora, Inc.*, 255 F.3d 379, 387 n.8 (7th Cir. 2001) ("[Defendant] also argues that there is no substantial relationship to traditional maritime activities because the riverboat casino is

not a vessel under maritime law. However, for these purposes a craft is a vessel if its purpose is to some reasonable degree the transportation of passengers, cargo, or equipment from place to place across navigable waters."; holding riverboat casino was a vessel where the casino was required by state law to navigate the river whenever it hosted gambling activities). Although application of these basic principles to differing facts may yield different results, there is no disagreement among the circuits that a transportation function is essential to vessel status.

Faced with this uniformity, petitioner struggles to fashion an argument that would warrant the involvement of this Court. Even if this Court were to entertain the argument that a vessel not "in navigation" for purposes of the Jones Act may be a "vessel" for purposes of the General Maritime Law, it does not change the fact that petitioner lacks any basis for a court to exercise maritime tort jurisdiction in this case. In order to maintain maritime jurisdiction, the tort must have both a maritime situs and a maritime nexus. To meet these requirements, the wrong must occur on navigable waters plus it must bear a significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc. v. City of Cleveland*, 409 U.S. 249, 268, 93 S.Ct. 493, 504 (1972).

The petitioner's accident had neither a maritime situs nor a maritime nexus. "A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water." *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 115 S.Ct. 1043, 1048 (1995). Petitioner's accident occurred on shore, not on navigable waters. Moreover, the accident was not caused in any way by a vessel on navigable water, but by

cooking oil allegedly leaking from garbage bags removed from a shoreside kitchen to a shoreside loading dock. The fact that petitioner was en route to her job aboard the TREASURE CHEST could potentially satisfy the requirement of a maritime situs only if the TREASURE CHEST was a vessel under the General Maritime Law, which it was not. Thus, applying even the most liberal jurisdictional reach, Martin does not satisfy the situs requirement.

Nor does her alleged accident have a maritime nexus. The nexus test looks first to whether the "general features of the type of incident" had a potentially disruptive impact on maritime commerce, and second, to "whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1118-19 (5th Cir. 1995) (citing *Grubart*, *supra*). Neither the petitioner's accident nor the activities giving rise to it meet these criteria. A slip and fall onshore in grease leaking from garbage bags removed from a shoreside kitchen has no potentially disruptive impact on maritime commerce and no relation whatsoever to traditional maritime activities. Moreover, the general character of the activity giving rise to the incident – maintaining the safety of a shoreside loading dock – does not bear "a substantial relationship to traditional maritime activity." *Coats*, *supra*. The requisites for maritime jurisdiction are, therefore, completely lacking here. *Id.*

For these reasons, the courts below were well within their broad discretion in refusing to allow Martin to amend her complaint to state a general maritime tort claim. The requisites for maritime jurisdiction and the

application of the General Maritime Law are lacking in this case.

CONCLUSION

In conclusion, the lower courts correctly held that the TREASURE CHEST was no longer a vessel "in navigation" when it ceased navigating to conduct dockside gaming on 1 April 2001. From that date forward, transportation over navigable waters no longer played any part in the TREASURE CHEST's performance of its primary function. Thus, petitioner was not a seaman when she was allegedly injured in October 2001, and her claims under the Jones Act and General Maritime Law were properly rejected. For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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(2)

Supreme Court, U.S.
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No. 04-570

In The

Supreme Court of the United States

MARY MARTIN,

Petitioner,

v.

BOYD GAMING CORPORATION d/b/a
M/V TREASURE CHEST CASINO
and TREASURE CHEST CASINO, LLC,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR REHEARING

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QUESTION PRESENTED

1. In *Stewart v. Dutra Construction Co.*, 543 U.S. ___, 2005 WL 405475 (February 22, 2005), this Court recently clarified the definition of a "vessel" for purposes of the LHWCA and the seaman status test, and overruled the "primary purpose" test first articulated in *DiGiovanni v. Traylor Bros., Inc.*, 959 F.2d 1119 (1st Cir. 1992). This Court overruled *DiGiovanni, supra*, because it improperly required that a vessel be primarily used for navigation, or if primarily used for construction, be in actual transit at the time of the injury. This Court found that the "primary purpose" approach was inconsistent with the text of 1 U.S.C. Section 3 or the established meaning of the term "vessel" under the general maritime law. *Stewart* at ___. In the present case, the Fifth Circuit used the same approach taken by the Court in *DiGiovanni, supra*, and therefore should be reversed. The question remains whether the M/V TREASURE CHEST CASINO is "practically capable" of transportation such that it satisfies the definition of "vessel" under 1 U.S.C. Section 3 and this Court's holding in *Stewart v. Dutra*.

PARTIES TO THE PROCEEDINGS

All parties to the proceedings are listed in the caption of the case.

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OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana granting defendants' motion for summary judgment is reported at 252 F.Supp.2d 321. The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 374 F.3d 375. The unreported order by the United States Court of Appeals for the Fifth Circuit denying a petition for rehearing is reprinted in Petitioner's Petition For A Writ Of Certiorari as Appendix 12. The Order denying Petitioner's Writ of Certiorari is reported at 2005 U.S. LEXIS 2089.

JURISDICTION

The United States District Court for the Eastern District of Louisiana had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1333, as plaintiff claimed seaman's remedies under the Jones Act, 46 U.S.C. § 688, and the general maritime law. The United States Court of Appeals for the Fifth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291 and Rule 4(a)(2) of the Federal Rules of Appellate Procedure, as well as 28 U.S.C. § 1292(a)(3), as the district court issued final, appealable judgments, dismissing plaintiff's Jones Act and general maritime law claims. The Fifth Circuit Court of Appeals issued the opinion below on July 8, 2004. The Fifth Circuit Court of Appeals denied a request for rehearing on August 6, 2004. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 44.

STATUTORY PROVISIONS INVOLVED

Section 3 of the Rules of Construction Act provides in relevant part:

> The word "vessel" includes every description of watercraft or other artificial contrivance used, or capable of being used, as a means of transportation on water.

1 U.S.C. § 3.

The Jones Act, 46 U.S.C. § 688(a), provides in relevant part:

> Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply. . . .

Section 5(b) of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. § 905, provides in relevant part:

> (b) Negligence of vessel –
>
> In the event of injury to a person covered under this chapter caused by the negligence of a vessel, then such person, or anyone otherwise entitled to recover damages by reason thereof, may bring an action against such vessel. . . .

33 U.S.C. § 905(b).

STATEMENT OF THE CASE

Martin sought relief under the Jones Act and the general maritime law for injuries that she sustained arising out of the negligence of the captain and navigational crew of the M/V TREASURE CHEST CASINO. Alternatively, Martin sought relief under the general maritime law for vessel negligence. For a more complete recitation of the facts of this case, Martin respectfully directs this Court to her Petition For A Writ Of Certiorari.

In response to Martin's Jones Act claim, the Fifth Circuit held that, because the **transportation function** of the M/V TREASURE CHEST CASINO was no longer its **primary function**, it was not a vessel for purposes of the Jones Act. *Martin v. Boyd Gaming*, 374 F.3d 375 (5th Cir. 2004). In response to Martin's general maritime law claim, the Fifth Circuit held, in a footnote, that " . . . because the TREASURE CHEST is not a vessel "in navigation" under the Jones Act it is likewise not a vessel under the general maritime law foreclosing either a general maritime law claim or a Section 905(b) claim." *Martin, supra*, at fn 1. Both of the Fifth Circuit's holdings are in direct conflict with this Court's recent holding and historical analysis in *Stewart v. Dutra Construction Co.*, 543 U.S. ___, 2005 WL 405475 (February 22, 2005).

REASONS FOR ALLOWANCE OF THE PETITION FOR REHEARING

In *Stewart*, this Court recently clarified the definition of a "vessel" for purposes of the LHWCA and the seaman status test, and overruled the "primary purpose" test first articulated in *DiGiovanni v. Traylor Brothers, Inc.*, 959

F.2d 1119 (1st Cir. 1992).[1] This Court overruled *DiGiovanni, supra*, because it improperly required that a vessel be primarily used for navigation, or if primarily used for construction, be in actual transit at the time of the injury. This Court found that the "primary purpose" approach was inconsistent with the text of 1 U.S.C. Section 3 or the established meaning of the term "vessel" under the general maritime law. *Stewart* at ___. The approach taken by the Fifth Circuit in the present case was the same approach taken by the Court in *DiGiovanni, supra*, and therefore should be reversed.

In *Stewart*, this Court held:

> **Section 3 requires only that a watercraft be "used, or capable of being used, as a means of transportation on water" to qualify as a vessel. It does not require that a watercraft be used *primarily* for that purpose.** (Quotations and italics in original, emphasis supplied).
>
> **Under Section 3, a "vessel" is any watercraft practically capable of maritime transportation, regardless of its primary purpose or state of transit at a particular moment.** (Quotations in original, emphasis supplied).
>
> **... The question remains in all cases whether the watercraft's use "as a means of transportation on water" is a practical possibility or merely a theoretical one. In some**

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[1] *DiGiovanni* relied upon the same Fifth Circuit cases, *Ducrepont v. Baton Rouge Marine Enterprises, Inc.*, 877 F.2d 393 (5th Cir. 1989) and *Gremillion v. Gulf Coast Catering, Inc.*, 904 F.2d 290 (5th Cir. 1990), as did the district and appellate courts in the present case. *See DiGiovanni, supra*, 959 F.2d at 1123.

> **cases that inquiry may involve factual issues for the jury.** (Quotations in original, emphasis supplied).

Stewart at ___.

In direct conflict with *Stewart* and 1 U.S.C. Section 3, the Fifth Circuit required that the M/V TREASURE CHEST CASINO's **primary function be transportation** over navigable waters **at the time of Martin's injury** to satisfy Jones Act vessel status. Since the Fifth Circuit found that the transportation function was no longer an important part of the business in which the vessel was engaged, the Court found that the M/V TREASURE CHEST CASINO simply was no longer a vessel for Jones Act purposes. Then, totally ignoring 1 U.S.C. Section 3, the Fifth Circuit held that, because not a vessel for Jones Act purposes, the M/V TREASURE CHEST CASINO was not a vessel under the general maritime law. This approach was flatly rejected by this Court in *Stewart* and now presents a conflict between the Fifth Circuit and this Court.

In *Stewart*, this Court referred to the floating work platform in *Pavone v. Mississippi Riverboat Amusement Corp.*, 52 F.3d 560 (5th Cir. 1995) as an example of a watercraft that was permanently removed from navigation and Martin fully agrees with the Court's analysis in that regard.[2] In *Pavone*, a barge that was originally constructed to be a floating work platform was secured to shore by

[2] The *Pavone* Court relied upon the same two cases as did the Court in *DiGiovanni*, namely *Ducrepont* and *Gremillion*, *supra*. Since this Court expressly overruled *DiGiovanni*, it now appears that, while the result reached in *Pavone* may be correct, the approach taken by the Fifth Circuit is suspect.

lines tied to sunken steel pylons, rendering it practically incapable of transportation or movement. However, the M/V TREASURE CHEST CASINO is vastly different from the permanently moored barge in *Pavone*.

The "continuously" moored status that the M/V TREASURE CHEST CASINO enjoys from the United States Coast Guard is on paper only, meaning that it remains "continuously" moored, as opposed to "permanently" moored, only while gambling patrons are onboard. On the other hand, it remains a fully operational passenger vessel and, in fact, still conducts periodic voyages. Its use as a means of transportation on water is certainly more than a "practical possibility" or theoretical one. It is a reality. Like the SUPER SCOOP in *Stewart*, the M/V TREASURE CHEST CASINO has not been taken out of service, permanently anchored, or otherwise rendered practically incapable of maritime transport. Consequently, if the Fifth Circuit's opinion is allowed to stand, the captain and crew of the M/V TREASURE CHEST CASINO will continue to move in and out of Jones Act and general maritime law coverage depending upon when gambling patrons are onboard. That does not appear to be the intent of Congress or this Court. Moreover, if the Fifth Circuit's opinion is allowed to stand, there will exist a lack of uniformity between the Fifth Circuit and this Court.

"Applying Section 3 brings within the purview of the Jones Act the sorts of watercraft considered vessels at the time Congress passed the Act." *Stewart* at ___. Certainly, traditional, paddle-wheel driven riverboats like the M/V TREASURE CHEST CASINO were considered vessels at the time the Jones Act was passed. At the very least, whether the M/V TREASURE CHEST CASINO's use as a

means of transportation on water is a "practical possibility" should be a factual issue for the jury. *Stewart* at ___.

CONCLUSION

The Fifth Circuit focused too narrowly on the M/V TREASURE CHEST CASINO's transportation function at the time of Martin's injury as being the decisive factor in determining vessel status. This approach was flatly rejected by this Court in *Stewart v. Dutra, supra*. The M/V TREASURE CHEST CASINO remains a fully operational, passenger vessel on navigable waters which, in fact, makes periodic voyages. Whether its use as a means of transportation on water is a "practical possibility" should be a factual issue for the jury.

Considering the foregoing, Martin respectfully requests that this Petition for Rehearing on Writ of Certiorari be granted, the Fifth Circuit's opinion be reversed and this matter be remanded to the district court for further proceedings consistent with this Court's decision in *Stewart v. Dutra, supra*.

Respectfully submitted,

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SUPREME COURT RULE 44 CERTIFICATE

Undersigned counsel hereby certifies to this Honorable Court that the reasons for seeking this Petition for Rehearing are limited to intervening circumstances of a substantial and controlling effect and which have not been previously presented and that this Petition is being presented in good faith and not for delay.

ERIC M. DAIGLE
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